The following motion to affirm is the only responsive document filed in opposition to the jurisdictional statement.

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In the Supreme Court of the United States

No. 73-858

ALFREDO GONZALEZ, individually and as representative of all others similarly situated,

Appellant,

vs.

MERCANTILE NATIONAL BANK OF CHICAGO, individually and as representative of all others similarly situated, and MICHAEL J. HOWLETT, Secretary of State of Illinois,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION OF APPELLEE, MERCANTILE NATIONAL BANK OF CHICAGO, TO DISMISS THE APPEAL FOR WANT OF JURISDICTION OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION.

Mercantile National Bank of Chicago ("the Bank"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed for want of jurisdiction, or, in the alternative, that the final judgment and decree of the District Court dismissing appellant's Amended Complaint be affirmed on the ground that the questions are so unsubstantial as not to warrant further consideration.

THE BACKGROUND OF THIS APPEAL

A. The Nature Of The Case.

This appeal is all that remains of litigation brought by four named debtor-plaintiffs, allegedly on behalf of a class, against five named creditor-defendants (also asserted to represent a class) and the Illinois Secretary of State.[1]

Three Counts of the Amended Complaint require mention. Count I, pleaded as a plaintiffs' and defendants' class action, asserted the constitutional invalidity of the "repossession" provisions of the Illinois Uniform Commercial Code (Ill. Rev. Stat., ch. 26, §§9-503, 9-504) and sought declaratory and injunctive relief against the creditor-defendants and their alleged class. That Count detailed four transactions, each between a named plaintiff and one or more named defendants, involving the financing by defendants of automobile purchases by plaintiffs and the repossession (or, in one instance, the "feared" repossession) of the automobiles. As to Mr. Gonzalez, Count I (¶¶15-23) alleged that he had executed a retail installment sales contract (subsequently assigned to the Bank) granting his seller a purchase money security interest in a 1968 Pontiac; that he was not in default under the contract; and that the Bank nevertheless repossessed the car,

[1] All named plaintiffs other than Mr. Gonzalez, and all named defendants other than the Bank and the Secretary of State, settled with each other at various times and are no longer directly involved in the litigation. Plaintiffs Mojica, Barnett, and Banks and defendants Automatic Employees Credit Union, Car Credit Corp. and Overland Bond & Investment Corp. and Wood Acceptance Corp. have so notified the Clerk of this Court. Those defendants remain in the case, if at all, only by virtue of the "defendant class" allegations of Count I.

obtained title to it, and transferred it to the original seller. (The record also showed that the original seller—not named as a defendant—in turn resold the car to a third party, also not named as a defendant, more than a month before Mr. Gonzalez or the Bank became parties to the litigation.)

Count II, pleaded as a plaintiffs' class action, asserted the constitutional invalidity of three sections of the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, §§3-114(b), 3-116(b), 3-612) providing for issuance of repossession certificates of title by the Illinois Secretary of State and authorizing the Secretary to issue temporary "repossession" license plates. Count II sought declaratory and injunctive relief against the Secretary, and prayed that a three-judge District Court be convened under 28 U.S.C. §2281.

In Count IV, which paralleled similar Counts involving the other named parties, Mr. Gonzalez sought damages from the Bank for wrongfully repossessing his car and depriving him, "under color of State law, of rights secured to him by the Constitution of the United States."[2]

B. The State Statutes Involved.

Mr. Gonzalez challenges portions of two Codes. Sections 9-503 and 9-504 of the Uniform Commercial Code (Ill. Rev. Stat., ch. 26, §§9-503, 9-504), as they now read

[2] Mr. Gonzalez and the Bank have stipulated that the maximum recovery on his damage claim would not exceed $750.00; the Bank has formally tendered that amount to him. Accordingly, Count IV is moot. See *Drs. Hill & Thomas Co.* v. *United States*, 392 F.2d 204 (6th Cir. 1968); *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973).

and as they stood before the 1973 amendment to one code, are set out in the Appendix.[3] Those sections in essence allow a secured party to "take possession of the collateral" upon default, proceeding without judicial process "if this can be done without breach of the peace" (§9-503), and regulate in detail the manner, form, timing, and effect of subsequent disposition of the collateral by the secured party (§9-504). Section 9-507 of the Code (Ill. Stat., ch. 26, §9-507), as it stood at the relevant times, is also set out in the Appendix. It provides injunctive and damage remedies to a debtor whose secured party violates Sections 9-503 or 9-504.

The pertinent provisions of the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, §§3-114, 3-116, 3-612) are also set out in the Appendix. Section 3-114(b), derived from a comparable section of the Uniform Vehicle Code, requires the transferee of a vehicle which has been sold (or in which the owner's interest has been terminated) "under a security agreement" to deliver to the Secretary of State, within fifteen days, the outstanding title certificate, an application for a new certificate, and an affidavit "that . . . the interest of the owner was lawfully terminated or sold pursuant to . . . the security agreement." Section 3-116(b), derived from the same source, obligates the Secretary, upon receipt of that application and all other documents "required by law," to issue the new certificate. Section 3-612 allows the Secretary to issue special license plates to persons engaged in making repossessions.

---

[3] The only change in the text of the five sections of the two Codes is found in §9-504 of the Uniform Commercial Code. The new text of that which became effective July 1, 1973, is found at Appendix B. No change has been made in the remaining four, found at Appendix A, which includes earlier text of §9-504.

C. The Proceedings and Opinion Below.

After a three-judge District Court was convened as prayed in Count II of the Amended Complaint, plaintiffs moved to certify Count I as a plaintiffs' and defendants' class action. The creditor-defendants opposed certification, in part on the ground that the named plaintiffs lacked standing to obtain relief under Count I and therefore could not adequately represent a class. The Secretary also moved to dismiss Count II, in part on similar grounds.

The three-judge District Court took the motions under advisement and on August 16, 1973, dismissed the Amended Complaint. *Mojica* v. *Automatic Employees Credit Union*, 363 F.Supp. 143 (N.D. Ill. 1973). The court held:

1. Plaintiffs lacked standing to challenge the constitutionality of the Uniform Commercial Code and Vehicle Code provisions involved, because—while those provisions allow repossession only upon default, and authorize the Secretary to transfer title only upon a "lawful" transfer of ownership—the Amended Complaint alleged that no plaintiff had been in default, that each repossession was unlawful, and that each creditor-defendant had acted maliciously (363 F. Supp. at 145):

> "Thus, in a case where they assert that the repossession and resale provisions of the Illinois [Uniform Commercial] Code were used *improperly* and *maliciously* against them, plaintiffs ask this Court to determine the validity of these statutes when *properly* applied to debtors *actually in default*. We must decline. Such a context is hardly appropriate for the resolution of the constitutional issues plaintiff presents . . .".
>
> ". . . The impropriety of hypothetical determinations concerning the proper application of a statute wrong-

ly applied in the given case have led the court to uniformly decline to make decisions such as plaintiff seeks." (Emphasis by the court)

2. Plaintiffs also lacked standing to seek *any* declaratory or injunctive relief under Counts I and II. As to Mr. Gonzalez, the District Court pointed out that his automobile had been repossessed and resold, and title thereto transferred (twice), before he became a party to the action, and said (363 F. Supp. at 146):

> "Granting declaratory and injunctive relief . . ., then, would be a 'useless act.' *See* Todd v. Joint Apprenticeship Committee, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 . . . (1965), McKee & Co. v. First National Bank, 397 F.2d 248 (9th Cir. 1968), and Manion v. Holtzman, 379 F.2d 843 (7th Cir.) cert. denied, 389 U.S. 976 . . . (1967). Each of these cases held that injunctive relief would not issue where the act sought to be enjoined was completed after the suit was filed. It follows that standing to seek such relief must be lacking where the challenged event was completed before the claim was instituted."

3. Both the class and the individual aspects of the suit should therefore be dismissed—as to the class because, "[s]ince plaintiffs here lack standing themselves, they certainly cannot represent others," and as to the named plaintiffs because "we conclude that [they] . . . fail to present a claim which can be reached on the merits." 363 F.Supp. at 146.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Mr. Gonzalez (Jur. Stmt., p. 3) bases this Court's jurisdiction upon 28 U.S.C. §§1253 and 2281. Section 1253 allows direct appeal only:

> ". . . from an order *granting or denying, after notice and hearing, an interlocutory or permanent injunction* in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges.*" [Emphasis supplied.]

Section 2281 requires a three-judge court only in cases where an injunction:

> ". . . restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute"

is sought "upon the ground of the unconstitutionality of such statute."

These jurisdictional statutes, "technical in the strict sense of the term," are to be "narrowly construed;" both "important considerations of judicial administration" and the "historical purpose" of the statutes so mandate. Hence no direct appeal lies to the Court (even if the lower court was one of three judges) unless all of the statutory requisites appear. *Phillips* v. *United States,* 312 U.S. 246, 251 (1941); *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128, 129 (1965). Those requisites are lacking here, because this case did

not require a three-judge court—a matter which, even though not raised below, may be considered by this Court. *Flast* v. *Cohen*, 392 U.S. 83, 88 n.2 (1968); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

A. Since Mr. Gonzalez Was Not Entitled To Injunctive Relief (And Since The District Court So Held On Non-Constitutional Grounds Unrelated To The Merits), Neither 28 U.S.C. §2281 Nor U.S.C. §1253 Applies Here.

A jurisdictional bar confronts Mr. Gonzalez at the outset. Explicitly holding that it was *not* reaching the merits, the District Court carefully analyzed Mr. Gonzalez' claims for injunctive relief, concluding that—since his car had been repossessed and transferred[4] (and indeed resold to still another buyer), with accompanying transfer of title, before he became a party to the suit—such relief could not be granted. *Mojica* v. *Automatic Employees Credit Union*, 363 F. Supp. 143, 144-45 (N.D. Ill. 1973).

The District Court was clearly correct. Granting injunctive relief would have been "a useless act." 1 High On Injunctions (4th Ed. 1905) §23; *Mexican Ore Co.* v. *Guadalupe Mining Co.*, 47 F. 351, 354-55 (D.N.J. 1891); *Todd* v. *Joint Apprenticeship Committee*, 332 F.2d 243, 247 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Nicholas* v. *Tower Grove Bank*, 362 F. Supp. 374, 378 (E.D. Mo. 1973), appeal pending No. 73-1621 (8th Cir.).

The very essence of 28 U.S.C. §§1253 and 2281, however, is that they run only to grants or denials of injunctive relief on constitutional grounds, and only to decisions

[4] The repossession title was issued June 16, 1972 (Jur. Stmt., App. E, pp. 34 a-c). The Amended Complaint making Mr. Gonzalez a party to the action was filed September 28, 1972.

on the merits. The three judge requirement is directed to determinations on the issue of constitutionality, not to decisions that for other reasons the court could not properly act. Accordingly, inability of the court to grant relief even if the constitutional claim is well founded justifies dismissal by a single judge. *Maryland Citizens For A Rep. Gen'l Assembly* v. *Governor of Md.*, 429 F.2d 606, 611 (4th Cir. 1970); *Utica Mut. Ins. Co.* v. *Vincent*, 375 F.2d 129, 134 n. 7 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967) (alternative holding). In *Barthelmes* v. *Morris*, 342 F. Supp. 153, 160-61 (D. Md. 1972), for example, the court, holding that plaintiffs' injunctive relief claims were barred by laches, refused to convene a three-judge court: ". . . the unavailability of injunctive relief goes to the substantiality of the claim and is within the province of the single district judge to determine."

In this case, like those above, the District Court held injunctive relief unavailable from the outset for reasons having nothing to do with the constitutional claims or the merits. Accordingly, its decision, whether made by three judges or not, is not appealable to this Court under 28 U.S.C. §1253.[5]

[5] This is not the unusual case of a dispute "capable of repetition, yet evading review" such as *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The very existence of the numerous federal court decisions dealing with the merits, cited post p. 12,—not to mention the numerous like state court decisions, including *Brown* v. *United States National Bank of Oregon*, 509 P.2d 442 (Sup. Ct. Ore. 1973), *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Sup. Ct. Fla. 1973), and *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A. 2d 402 (1972)—so demonstrates.

B. The Naming Of The Illinois Secretary Of State As A Nominal Defendant Does Not Satisfy The Requirements of 28 U.S.C. §2281.

This action is properly brought under 28 U.S.C. §2281 only if it is one seeking to restrain the action of a state officer in "the enforcement or execution" of a state statute. The Secretary of State of Illinois is named as a party defendant in his capacity as the administrator of the Illinois Vehicle Code. However, the basic purpose of the action is to enjoin creditors from repossession of motor vehicles pursuant to §9-503 of the Illinois Uniform Commercial Code while that deprivation may still be prevented. The Secretary of State, however, has nothing whatever to do with the action of creditors in repossessing personal property. He becomes involved only when the collateral is a motor vehicle and only then at a later stage.

Even then his involvement consists only of the "mere ministerial act" of recognizing a transfer which has already taken place. *Nicholas* v. *Tower Grove Bank,* 362 F.Supp. 374, 377-78 (E.D.Mo. 1973), appeal pending No. 73-1621 (8th Cir.)[6]

[6] The very Vehicle Code sections which Mr. Gonzalez attacks underscore this point. Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b) call for action by the Secretary only after the "interest of the owner [has been] terminated or the vehicle [has been] sold," and limit the Secretary's authority to issue a new certificate of title only to cases in which the applicant has stated under oath that the prior owner's interest was "lawfully" terminated. Even at that stage, Ill. Rev. Stat., ch. 95½, §3-114(c) carefully deprives that narrow authority of any substantive effect on the parties' rights:

> "The delivery of [the prior owner's certificate of title] pursuant to the request of the Secretary of State does not affect the rights of the person surrendering the certificate, and the action of the Secretary of State in issuing a new certificate of title as provided [in §3-114(b)] is not conclusive upon the rights of an owner or lien holder named in the original certificate."

The requirement of 28 U.S.C. §2281 that an injunction be sought to restrain the "enforcement or execution" of the challenged statute by a State officer "is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp, W.O.W.,* 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers,* 387 U.S. 97, 102 (1967). However, as the aforementioned decisions and statutory provisions demonstrate, the Secretary of State is only a "nominal defendant" here. He has no more to do with the validity of repossessions—even of automobiles—than, for example, a court clerk who records a foreclosure deed has to do with the constitutional propriety of the foreclosure sale, *Giordano* v. *Stubbs,* 335 F. Supp. 107, 109 (N.D. Ga. 1971), or a state banking superintendent who licenses lenders has to do with the constitutionality of wage assignments, *Bond* v. *Dentzer,* 325 F. Supp. 1343, 1348-49 (N.D.N.Y. 1971).

The weight of authority so holds. In *Nicholas* v. *Tower Grove Bank,* 362 F.Supp. 374, 377-78 (E.D. Mo. 1973), the court held the issuance of repossession titles to be a "mere ministerial act which follows, but constitutes no part of, the repossession" (adding that "the basic thrust of the complaint is that the *Bank* deprived plaintiff of her property"), inadequate to amount even to "state action" for purposes of 42 U.S.C. §1983 and 28 U.S.C. §1343. *Accord, Kirksey* v. *Theilig,* 351 F.Supp. 727, 729-32 (D. Colo. 1972). In *Gibbs* v. *Titelman,* No. 72-2165 (E.D. Pa., Nov. 21, 1972), reprinted in Appendix C, the court squarely rejected the precise argument urged by Mr. Gonzalez here, even though it found "state action" present.[7] (The only

[7] All but three of the other federal decisions reported to date have held "state action" lacking, even in automobile cases. An appeal of

contrary authority we have found, moreover, involved a statute which the court read quite differently from the Illinois statute and did not consider the issue under discussion. *Michaelson* v. *Walter Laev, Inc.*, 336 F. Supp. 296, 298 (E.D. Wis. 1972).)

We respectfully submit that *Nicholas, Kirksey* and *Gibbs* are right on this issue. They are supported not only by this Court's traditionally "constrictive view" of 28 U.S.C. §2281, *Swift & Co., Inc.* v. *Wickham*, 382 U.S. 111, 129 (1965), but also by the complete irrelevance of the Secretary to the real issues here. Even were he enjoined

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(footnote continued)

a subsequent decision in *Gibbs* v. *Titelman*, ... F. Supp. ....., 13 U.C.C. Rep. 40 (E.D. Pa. 1973) is pending as No. 74-1063 (3rd Cir.). Only two cases other than *Gibbs* and *Michaelson* have considered whether to convene a three-judge court. *Adams* v. *Egley*, 338 Supp. 614, 616-17 (S.D. Cal. 1972), rev'd on other gds., ... F.2d ....., 13 U.C.C. Rep. 161, pending on petition for rehearing en banc filed (9th Cir. Oct. Oct. 4, 1973) (state action present [the ground of reversal] but three-judge court unwarranted because no state officer sought to be enjoined); *McCormick* v. *First Nat'l Bank*, 322 F. Supp. 604, 608 (S.D. Fla. 1971) (no state action; three-judge court unwarranted because no state officer sued). The issue of a three-judge court simply did not arise in the remaining cases: *Oller* v. *Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972) (no state action); *Shelton* v. *General Electric Credit Corp.*, 359 F.Supp. 1079 (M.D. Ga. 1973) (no state action); *Greene* v. *First Nat'l Exch. Bank*, 348 F. Supp 672 (W.D. Va. 1972) (no state action); *Kirksey* v. *Theilig*, 351 F. Supp. 727 (D. Colo. 1972) (no state action); *Pease* v. *Havelock Nat'l Bank*, 351 F.Supp. 118 (D. Neb. 1972) (no state action); *Colvin* v. *Avco Fin. Services*, ... F.Supp. ....., 12 U.C.C. Rep. 25 (D. Utah 1973) (no state action); *Shirley* v. *State Nat'l Bank*, ... F.Supp. ....., 13 U.C.C. Rep. 43 (D. Conn. 1973), appeal pending No. 73-1783 (2d Cir.) (no state action); *James* v. *Pinnix*, 4 CCH Sec. Tran. ¶52,172 (S.D. Miss. 1973), appeal pending No. 73-1866 (5th Cir.) (state action); *Baker* v. *Keeble*, 362 F.Supp. 355 (M.D. Ala. 1973) (no state action); *Nicholas* v. *Tower Grove Bank*, 362 F.Supp. 374 (E.D. Mo. 1973), appeal pending No. 73-1621 (8th Cir.) (no state action); *Boland* v. *Essex Cty. Bk. & T. Co.*, 361 F.Supp. 917 (D. Mass. 1973) (state action).

from applying the challenged Vehicle Code provisions, the basic purpose of the Amended Complaint—to prevent repossessions without prior notice and hearing—would not be achieved.

II.

IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

Even if this Court concludes that Mr. Gonzalez' appeal is properly before it, the judgment of the District Court should be affirmed at this time. Its decision as to Mr. Gonzalez' standing to seek injunctive relief in support of his constitutional claim is correct (ante, p. 8). Its conclusion as to his ability to represent a class is equally correct. "A plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly ensure the adequate representation' of those alleged to be similarly situated," *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). He is in no better position to represent others whose rights may go beyond his own, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962); *Propst* v. *Board of Educ. Lands & Funds*, 103 F.Supp. 457, 462 (D. Neb. 1951), *app. dism.*, 343 U.S. 901 (1952).

Whatever may be the case with respect to the merits of Mr. Gonzalez' constitutional claims—which the District Court did not reach, upon which no record was made,[8] and

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[8] Even had some record been made, this case—as the District Court pointed out—is hardly an appropriate one for resolution of the constitutional issue tendered. For a far more appropriate factual context, see, *e.g.*, *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972).

which are not presented by this appeal—we respectfully submit that the narrow issues upon which the District Court ruled and which are involved in this appeal do not tender questions sufficiently substantial to warrant further consideration.

CONCLUSION

For the foregoing reasons, appellee, Mercantile National Bank of Chicago, submits that this Court has no jurisdiction of this appeal. In the alternative, appellee submits that the questions presented are not substantial. Appellee therefore respectfully requests that this Court dismiss this appeal for want of jurisdiction or, in the alternative, that it affirm the judgment below for want of a substantial question.

Respectfully submitted,

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APPENDIX

APPENDIX A

PERTINENT PROVISIONS OF ILLINOIS UNIFORM COMMERCIAL CODE AND ILLINOIS VEHICLE CODE AT RELEVANT TIMES.

Ill. Rev. Stat., ch. 26, § 9-503. Secured Party's Right to Take Possession After Default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

Ill. Rev. Stat. ch. 26, § 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceedings of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must reasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to

any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Ill. Rev. Stat., ch. 26, §9-507. Secured Party's Liability for Failure to Comply With This Part

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

Ill. Rev. Stat., ch. 95½, § 3-114(b)

If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

Ill. Rev. Stat., ch. 95½, §3-116(b)

The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, the Secretary of State shall make demand therefor from the holder thereof.

Ill. Rev. Stat., ch. 95½, § 3-612. Repossessor plates

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used

by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract.

Said special plates shall, in addition to the legends provided in Section 3-412 of this Act, contain a phrase "repossessor" and such other letters or numbers as the Secretary of State may prescribe. If an applicant for such plates is engaged in repossessing vehicles for other persons and does not hold a certificate, registration or permit from the Illinois Commerce Commission to conduct such an operation, the application shall be denied.

APPENDIX B

TEXT OF SECTION 9-504 OF ILLINOIS UNIFORM COMMERCIAL CODE EFFECTIVE JULY 1, 1973

§ 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale

of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the

secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Amended by P.A. 77-2810, § 1, eff. July 1, 1973.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY H. and THELMA GIBBS; and ELLA LEMAR, on their own behalf and on behalf of all others similarly situated

V.

WILLIAM A. TITELMAN, individually and as Director of the Bureau of Motor Vehicles of the Commonwealth of Pennsylvania

GENERAL MOTORS ACCEPTANCE CORPORATION AUTO-ROAD, INC.

CIVIL ACTION NO. 72-2165

OPINION

BECHTLE, *J.* November 22, 1972

On November 2, 1972, the above-named plaintiffs, purporting to act as a class, filed a complaint seeking to have a Pennsylvania state statutory scheme involving the repossession of motor vehicles declared unconstitutional;[1]

[1] The statutes in question are 69 P.S. §623 (Repossession), §624 (Reinstating of Contract After Repossession), §625 (Redemption and Termination of Contract After Repossession), §626 (Sale of Motor Vehicle After Repossession), §627 (Deficiency of Judgment); also challenged are certain sections of the Uniform Commercial Code, as adopted in Pennsylvania, insofar as they give a secured creditor the summary right of repossession upon default. 12A P.S. §9-503 (Secured Party's Right to Take Possession After Default), §9-504 (Secured Party's Right to Dispose of Collateral After Default; Effect of Disposal).

and to have defendant, General Motors Acceptance Corporation (GMAC), and all parties purported to be in the class of automobile repossessors enjoined from continuing to effect non-consentual repossessions of motor vehicles. The complaint sought further to have the defendant, William Titelman, Pennsylvania Director of Motor Vehicles, enjoined from permitting the transfer of titles of automobiles so repossessed. Also on November 2, 1972, plaintiffs moved for a Temporary Restraining Order (TRO)[2] which sought:

(1) To immediately restrain defendant Titelman from transferring title to any non-consentual repossessed motor vehicle in Pennsylvania;

(2) To immediately restrain defendant Auto-Road, Inc., from selling the automobile of plaintiff Ella Lemar,[3] which it had repossessed;

(3) To order Auto-Road to return plaintiff Lemar's automobile.

An informal hearing was held on the motion for a TRO on the same day; counsel for the plaintiffs, GMAC and Titelman appeared. No one appeared for Auto-Road, Inc. We denied the relief sought against defendant Titelman, for the reason that it did not appear from the specific facts shown by the verified complaint that anything defendant Titelman did (or does) causes the applicants the

[2] Two days previous oral notice of the intention to file the application for a TRO was given to defendants Titelman, GMAC and Auto-Road.

[3] At the time of the application, the automobile of named plaintiffs Harry and Thelma Gibbs had already been repossessed and sold; therefore, they are not a party to the application for a TRO, but remain members of the class challenging the statutory scheme.

irreparable harm of which they complain. We also denied the application to order Ella Lemar's automobile returned to her because we believe that, until evidence is introduced in an adversary proceeding on the validity of the statutes, it is not at all clear that these plaintiffs have a greater right to the possession of the automobile in question than the defendant in possession. We did, however, grant the temporary restraint of the sale of the Lemar automobile by Auto-Road. On that point, we found that the sworn facts showed that irreparable harm would result to Mrs. Lemar if the sale were not temporarily restrained.

A formal hearing was set for November 9, 1972, at which time we entertained argument from all interested parties as to:

(1) This jurisdictional question of whether or not this is a proper case for convening a Three-Judge Court pursuant to 28 U.S.C., §2281 and §2284;

(2) Whether jurisdiction lies for a single judge to hear this matter pursuant to 28 U.S.C., § 1343(3) and §1343(4);

(3) Whether the TRO, entered on November 2, 1972, should be extended, pending the outcome of a hearing (either by three judges or by one judge) on the constitutionality of the statutes in question.

I. THREE-JUDGE COURT

28 U.S.C., §2281, entitled, "Injunction Against Enforcement of State Statute; Three-Judge Court Required," states:

> "An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under state statutes, shall not be granted by any District Court or Judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three Judges under §2284 of this title."

By its terms, §2281 embraces only those cases in which an interlocutory injunction is sought to prevent the operation of a state statute "by restraining the action" of a state officer "in the enforcement or execution of such statute." *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 580 (1939). Here it appears on the face of the complaint that the statutes assailed are those prescribing a right of summary repossession. (See paragraphs 5 and 46 of the Complaint.) Although Titelman, a state officer, is named in the complaint,[4] it is well settled that a state officer cannot be named perfunctorily or as a nominal defendant in an attempt to attain the necessary official action. *Moody* v. *Flowers*, 387 U.S. 97, 101-102 (1966); *Wilentz* v. *Sovereign Camp, W.O.W.*, supra at page 579-580.

Neither Titelman nor any other state officer is clothed with the authority to enforce these statutes. The alleged deprivation prescribed by the statutes take place before an action or indeed any knowledge on the part of defendant Titelman, comes into play. Enjoining Titelman would not redress this deprivation.

The statute under which Titelman acts is 75 P.S., §208, entitled, "Change of Ownership by Operation of Law and Judicial Sale." The statute provides that in the case of a

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[4]Although the plaintiffs do not mention the statute under which Titelman is empowered to act (75 P.S. 208) at all in the body of the Complaint, they seek a declaration of its unconstitutionality, as it applies to non-censentual extra-judicial repossessions, in their prayer for relief.

transfer of ownership or possession of a motor vehicle, by operation of law (e.g., inheritance, an order in bankruptcy, or repossession, etc.), it becomes duty of the one in possession of the motor vehicle to surrender the Certificate of Title to the person to whom possession has so passed. The secretary (Titelman), upon surrender of the outstanding Certificate of Title, or upon presentation of satisfactory proof to the secretary of ownership and right of possession to such motor vehicle, they issue to the new possessor a Certificate of Title.

Nothing in this statute provides for an extra-judicial deprivation of property. Signing a Certificate of Title does not confer possession or ownership in anyone.[5] In fact, "satisfactory proof of ownership and right to possession must exist" before a Certificate of Title can be assigned. We can see no language on the face of this statute (75 P.S., §208) which would make it constitutionally suspect; and the plaintiffs have not alleged any facts to show that it is unconstitutional as applied. For these reasons, we find the jurisdictional prerequisite of action by a state officer absent and, therefore, must refuse, under 28 U.S.C., §2281, the request to have a Three-Judge Court empaneled.

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[5] The primary purpose of the act (assignment of Certificate of Title) was not designed to establish the ownership or proprietorship of an automobile, but rather to register the name and address of a person having the right to possession, and to furnish persons dealing with one in possession of an automobile a means of determining whether such possession was prima facie lawful. *Semple* v. *State Farm Mutual Auto Insurance Company*, 215 F. Supp. 645, 647 (E.D. Pa. 1963).

II. 28 U.S.C., §1343

Plaintiffs also seek to invoke jurisdiction of the District Court under 28 U.S.C., §1343(3) and §1343(4).[6] Section 1343 states in part:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

The statutory schemes in question, 69 P.S., §§ 623-627, and 12A P.S., §9-503 and §9-504, prescribe a right in a seller (also holder or secured creditor) to summarily repossess property which is the subject of a contract (or security agreement) when the buyer is in default under that contract. 69 P.S., §§623-627, is specifically limited to repossessions of motor vehicles pursuant to installment sales contracts.

The sole issue for determination here is whether the actions of the defendants in repossessing motor vehicles are performed "under color of state law."

Defendant, GMAC, claims that what is involved here are private contracts whose terms are self-executing, independent of these statutes; and that the statutes merely codify a longstanding self-help remedy which requires no state aid or action of a state official. This argument has

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[6] This section is the jurisdictional counterpart of 42 U.S.C., §1983, which entitles a person to a civil action for deprivation of rights.

been made in a number of recent state and Federal actions dealing with this exact issue. See *Adams* v. *Egley,* 338 F. Supp. 614 (S.D. Cal. 1972); *Oller* v. *Bank of America,* 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick* v. *First National Bank of Miami,* 322 F. Supp. 604 (S.D. Fla. 1971); *Greene* v. *First National Exchange Bank of Virginia,* ..... F. Supp. ..... (W.D. Va. 1972); and *Messenger* v. *Sandy Motors, Inc.,* (New Jersey Superior Court filed October 6, 1972); all of these holdings have come in the wake of the U. S. Supreme Court's decision in *Fuentes* v. *Shevin,* 92 S. Ct. 1983 (1972), which declared the replevin statutes of Pennsylvania and Florida unconstitutional.

In *Adams* v. *Egley,* the Court disagreed with the defendant's argument and found that the situation was governed by *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). *Reitman* affirmed a lower court's ruling that a section of the California Constitution, which prohibited restrictions on an individual's right to sell property to whomever he chooses, was unconstitutional. Despite the fact that all parties were private individuals and no state official or personnel were involved, the Court found that the enactment of this action encouraged and involved the state in private discriminations. *Adams* found the analogous state involvement in a repossession setting. We agree with this analysis.

Like *Adams,* we feel the statutes have a marked effect on the alleged private contract. The Gibbs contract, captioned "Pennsylvania Motor Vehicle Installment Sales Contract," is a standard form and incorporates verbatim section of 69 P.S., §§623-627 (see plaintiff's exhibit "B" attached to Complaint). It is clear that summary repossessions pursuant to a contract is a sanctioned policy in Pennsylvania. "When private action conforms with state

policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action." *Adickes* v. *S. H. Kress and Company,* 398 U.S. 144, 204 (1970) (Brennan J. concurring in part and dissenting in part).

Oller v. *Bank of America,* supra, decided twenty-five (25) days after *Adams,* comes to the opposite conclusion on the issue of state involvement. The Court distinguished *Adams'* reliance on *Reitman* by claiming that *Reitman* dealt with racial discrimination in violation of the due process clause and thus presented a compelling factual situation for which the Civil Rights Act was designed to protect. "The historical, legal and moral considerations fundamental to meet racial injustices are simply not present in the instant case." 342 F. Supp. 21, ... We cannot agree with the *Oller* Court's narrow interpretation of the Civil Rights Act and its jurisdictional counterpart.[7]

Since *Reitman,* the theory of private acts "under color of state law" has expanded well beyond the racial discrimination area. Some non-racial cases adopting the *Reitman* theory are:

Klim v. *Jones,* 315 F. Supp. 109 (N.D. Cal. 1970); and *Collins* v. *Viceroy Hill Corp.,* ..... F. Supp. ..... (N.D. Ill. 1972) involving innkeeper lien laws which gave the innkeeper a lien on all property of tenants for charges allegedly due. The law also provided for the self-help

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[7] *Greene* v. *First National Bank of Virginia, supra,* like *Oller* comes to the conclusion that "because the operation of the statute (repossession statute) involved does not require the aid, assistance, or interaction of any state agent, body, organization, or function, the *state* has not deprived the plaintiff of his property." ..... F. Supp. at ..... For the reasons, cited above, that we disagree with *Oller,* we also disagree with *Greene.*

right of possessing and selling the property independent of any action by a state officer;

Hall v. *Garson,* 430 F.2d 430 (5th Cir. 1971) which found that a landlord's actions in seizing and selling a tenant's goods pursuant to the self-help provisions of a state statute was sufficiently "under color of state law" to invoke §1343.

The other cases that the defendant, GMAC, cites, *Messenger* v. *Sandy Motors, Inc.,* supra, and *McCormick* v. *First National Bank of Miami,* supra, follow the rationale used in the *Oller* case, and come to the conclusion that no state action is involved. *Messenger* also relies heavily on the fact that self-help has been known to common law for centuries and, but for this fact, "it might be difficult to sustain this conclusion." However, the Supreme Court in a leading decision in the procedural due process area, *Sniadach* v. *Family Finance Corporation of Bay View,* 395 U.S. 337, effectively refuted any reliance on age-old tradition by stating, "the fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." 395 U.S. at 340.

Therefore, it is the finding of this Court that jurisdiction to hear this matter pursuant to 28 U.S.C., §1343 does exist.

ORDER

AND NOW, this 22rd day of November, 1972, it is hereby ORDERED that:

1. The plaintiffs' petition for application of Three-Judge Court pursuant to 28 U.S.C., §2281 is *denied.*

2. The Temporary Restraining Order requested as to defendant, William A. Titelman, is *denied.*

3. The Temporary Restraining Order requested as to defendant, Auto-Road, Inc., is *denied* on the ground of mootness.

4. A hearing for a preliminary injunction and for a determination of the class action allegations will be held on November 30, 1972, at 3:30 p.m. at the United States Courthouse, Philadelphia, Pennsylvania.

5. The attorneys for the plaintiffs and the attorneys for the Commonwealth of Pennsylvania shall give notice of the above hearing of the members of the class sought to be included by the plaintiffs as the class of defendants ultimately bound by any class determinations of the Court.

/s/ Louis C. Bechtle

Louis C. Bechtle, J.